LACK OF MUTUALITY OF REMEDY AT INCEPTION OF CONTRACT NO BAR TO SPECIFIC PERFORMANCE

Gould v. Stelter,
14 Ill.2d 376, 152 N.E.2d 869 (1958)

Plaintiff sought specific performance when defendant refused to convey real property under a written contract of sale between himself and the plaintiff, the latter acting as agent under authority of a power of attorney for the principal purchaser. Defendant contended that he could not be compelled to fulfill the contract because the principal purchaser was not bound, not having signed nor authorized the plaintiff to sign in her own name under the power of attorney. The trial court found, in favor of defendant, that this lack of mutuality precluded a grant of equitable relief. The Illinois Supreme Court reversed, declaring that want of mutuality at the inception of a contract would not bar an action for specific performance.[1]

The requirement of mutuality of remedy in an action for specific performance, that plaintiff's own promise must be legally enforceable before he can enforce the defendant's promise, first received notice in several early English cases.[2] These cases involved essentially problems of mutuality of *performance*; under their particular fact situations there was no assurance that plaintiff would perform if the performance of the defendant were compelled. From them, however, Lord Justice Fry, in 1858, formulated his rigorous rule[3] of mutuality of remedy at the inception of the contract. The theory of Fry's doctrine was that equality is equity, and perfect equality demands that the same equitable remedies be equally available to both parties to the contract.

At first the courts generally accepted this rule, apparently confusing the problems of mutuality of remedy, mutuality of performance and mutuality of obligation.[4] It became evident, however, that a strict application of the doctrine often resulted in inequitable and unduly harsh decisions. The courts consequently developed exceptions to the rule, which

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[1] Gage v. Cummings, 209 Ill. 170, 70 N.E. 679 (1904) and Wlocyewski v. Kozlowski, 395 Ill. 402, 70 N.E.2d 560 (1947) are overruled so far as they are based upon a supposed want of mutuality.

[2] Flight v. Bolland, 4 Russ. 298, 38 Eng. Rep. 817 (1828) (minor); Hamilton v. Grant, 3 Dow. 33, 3 Eng. Rep. 980 (1815) (personal services); Lawrence v. Butler, 1 Sch. & Lef. 13 (1807) (minor).

[3] "A contract to be specifically enforced by the court must, as a general rule, be mutual, that is to say, such that it might at the time it was entered into, have been enforced by either of the parties against the other of them." FRY, SPECIFIC PERFORMANCE § 287 (1st ed. 1858).

[4] See, *e.g.*, Barker v. Hauberg, 325 Ill. 538, 156 N.E. 806 (1927); Ulrey v. Keith, 237 Ill. 284, 86 N.E. 696 (1908); Gage v. Cummings, *supra* note 1; Hutcheson v. Heirs of McNutt, 1 Ohio 14 (1821); Steel v. Murphy, 10 Ohio App. 150 (1918).

became so numerous that they eventually swallowed the rule itself.[5] It could no longer be said that the doctrine of mutuality of remedy was the prevailing law. Fry's rule has been rejected by legal scholars as harsh and oppressive,[6] and either expressly or in essence repudiated in the majority of jurisdictions.[7]

Ames' attempted to formulate a more satisfactory rule in 1903.[8] His rule, though an improvement, was still overly rigid in requiring strict mutuality of performance. The courts could not compel the defendant to perform unless they could compel the performance of the plaintiff. This would leave the courts powerless in situations where it might be desirable to compel defendant's performance even though the plaintiff's performance is not specifically enforceable.[9]

In *Gould*, the Illinois court, recognizing that a strict application of the mutality of remedy doctrine would be unfair in balancing the equities of the parties, has adopted the rule of the majority of the states. If one who suffers from a breach of contract has no adequate remedy at law, yet has performed or the court is assured he will perform, he should not be denied equitable relief because of lack of mutuality of remedy at the inception of the contract. The granting of specific performance will, under this rule, be founded upon a more realistic mutuality of *performance*, the court granting the discretionary relief when it appears, at the time of the suit, that the defendant will receive the agreed exchange and that no injustice or hardship will inure to him as a result of the decree.

Such assurance that the plaintiff will perform may be found by the court in the acts or conduct of the plaintiff, or in the power of the court to require bond or issue a conditional decree.[10] Mr. Justice Cardozo de-

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[5] See, *e.g.*, Lewis v. McCreedy, 378 Ill. 264, 38 N.E.2d 170 (1941); Ullsperger v. Meyer, 217 Ill. 262, 75 N.E. 482 (1905). See also Ames, *Mutuality in Specific Performance*, 3 COLUM. L. REV. 1 (1903) (eight exceptions); CLARK, EQUITY § 175 (1954) (ten exceptions).

[6] See, *e.g.*, Ames, *supra* note 5; Langdell, *Equity, Specific Performance, Mutuality of Remedy*, 1 HARV. L. REV. 104 (1887); Cook, *The Present Status of the Lack of Mutuality Rule*, 36 YALE L. J. 897 (1927); Durfee, *Mutuality in Specific Performance*, 20 MICH. L. REV. 289 (1922); 5 WILLISTON, CONTRACTS § 1433 (rev. ed. 1937); RESTATEMENT, CONTRACTS § 372 (1932).

[7] Fuchs v. United Motor State Co., 135 Ohio St. 509, 21 N.E.2d 669 (1939). See Annot., 22 A.L.R.2d 508, 572 (1952), which states that only five states follow the doctrine.

[8] "Equity will not compel specific performance by a defendant if, after performance, the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract." Ames, *supra* note 5 at 2.

[9] It fails to cover situations where plaintiff's promise is for personal services, though because of vast expenditures and preparation on his part it appears to the court he will perform. Zelleken v. Lynch, 80 Kan. 746, 104 Pac. 563 (1909); it also fails to cover situations involving personal services or output agreements which contain negative covenants. Standard Fashion Co. v. Siegal-Cooper Co., 157 N.Y. 60, 51 N.E. 408 (1898).

[10] City of LaFollette v. LaFollette Water Co., 252 Fed. 762 (6th Cir. 1918);

scribes the court's role in balancing the equities as one of "exact (ing) today as a condition of relief . . . the assurance that the decree, if rendered, will operate without injustice or oppression to plaintiff or defendant . . . Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end."[11]

J. K. Skomp

Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 Fed. 603 (7th Cir. 1917); Fuchs v. Motor Stage Inc., 62 Ohio App. 20 (1939) (*aff'd, supra* note 7, without discussion on this point). See 5 WILLISTON, CONTRACTS § 1440 (rev. ed. 1937); RESTATEMENT, CONTRACTS § 373 comment (b) (1932).

[11] Epstein v. Gluckin, 233 N.Y. 490, 494, 135 N.E. 861, 862 (1922).